91-261

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Petitioner,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The National Labor Relations Act, as amended—through NLRA §§ 8(e) & 8(f), 29 U.S.C. §§ 158(e) & 8(f), which Congress carefully crafted to take account of the special needs of construction industry labor relations—permits property owners who are developing their property to specify that all contractors and subcontractors working on the building project must agree to a uniform labor agreement governing all project work. Nothing in the NLRA, in any National Labor Relations Board decision, or in any prior judicial decision limits that permission to private property owners. The question presented here is:

Whether—as the First Circuit held in its 3-2 *en banc* decision—the NLRA *impliedly* denies the owners of public property the very prerogatives in developing their property that the NLRA vouchsafes to private property owners, even when the State's actions serve the same proprietary interests and have the same effects on all concerned?

PARTIES

Petitioner Building and Construction Trades Council of the Metropolitan District was a defendant-appellee in the proceedings before the *en banc* Court of Appeals.

Other defendants-appellees in the proceedings before the *en banc* Court of Appeals were the Massachusetts Water Resources Authority and the members of its Board of Directors (John P. DeVillars, Chairman; John J. Carroll, Vice Chairman; Lorraine M. Downey, Secretary; Robert J. Ciolek, member; William A. Darity, member; Anthony V. Fletcher, member; Samuel G. Mygatt, member; Thomas E. Reilly, Jr., member; and Walter J. Ryan, Jr., member), in their official and individual capacities; and Kaiser Engineers, Inc.

Plaintiffs-appellants in the proceedings below were Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.; Associated Builders and Contractors, Inc.; Concrete Structures, Inc.; Fraser Engineering Company, Inc.; Plumb House, Inc.; Charwill Construction, Inc.; and Chesterfield Associates, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF FACTS	2
REASONS FOR GRANTING THE WRIT	7
I. THE IMPORTANCE OF THE STATE INTERESTS AND LABOR RELATIONS INTERESTS AT ISSUE	9
II. THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S NLRA PREEMPTION DOCTRINES	14
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Associated General Contractors v. Otter Tail Power, 611 F.2d 684 (8th Cir. 1979) 12
Associated Builders & Contractors of Kentuckiana, Inc. & Ohbayashi Corp., Civil Action No. 87-38 (D. Ky. Oct. 26, 1987) 12
Building & Trades Council, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) 5
Fry v. United States, 421 U.S. 542 (1975) 8
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 8
Garner v. Teamsters, 346 U.S. 485 (1953) 21
Gibbons v. Ogden, 9 Wheat 1 (1824) 9
Glenwood Bridge, Inc. v. City of Minneapolis, —— F.2d ——, Slip op. No. 91-1442 (8th Cir. August 2, 1991) 14
Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986) 19, 20, 22, 23
Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) 18, 19, 20, 21
International Union of Operating Engineers, Local 3, NLRB Case Nos. 27-CE-27 & 28 (NLRB-Reg. Dir. April 16, 1982) 12
Jim McNeff v. Todd, 461 U.S. 260 (1983) 11, 17, 18, 24
Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) ..... *passim*
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 15, 16, 18, 19, 22
Morrison-Knudsen Co., 13 NLRB Adv. Mem. Rep. ¶ 23,061 (NLRB-GC 1986) 12, 24
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) 15
New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979) 22
San Diego Building Trades v. Garmon, 359 U.S. 236 (1959) 15, 21, 24
Teamsters v. Morton, 377 U.S. 252 (1964) 14
United States v. Metropolitan District Commission, C.A. No. 85-0489-MA (D. Mass. 1990) 3

TABLE OF AUTHORITIES—Continued

Page

Wisconsin Public Intervenor v. Mortier, —— U.S. ——, 59 L.W. 4755 (June 21, 1991) 8
Woelke & Romero Framing Co. v. NLRB, 456 U.S. 645 (1982) 17, 18

STATUTES:

28 U.S.C. § 1254(1) 2
National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* ..... *passim*
§ 2(2), 29 U.S.C. § 152(2) 2, 7
§ 8(e), 29 U.S.C. § 158(e) 2, 5, 17
§ 8(f), 29 U.S.C. § 158(f) 2, 5, 17
§ 10(a), 29 U.S.C. § 160(a) 20

MISCELLANEOUS:

D.Q. Mills, *Industrial Relations and Manpower in Construction* (1972) 10
U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: The Problems and Prospects* (1980) 11

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PETITION FOR A WRIT OF CERTIORARI

The Building and Construction Trades Council of the Metropolitan District petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the First Circuit to review the judgment in *Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., et al. v. Massachusetts Water Resources Authority, et al.*, —— F.2d ——, 137 LRRM 2249 (1991) (*en banc*).

OPINIONS BELOW

The *en banc* decision of the First Circuit is reprinted as Appendix A in the separately bound Appendix ("App.") to this *certiorari* petition. *See* App. 1a-47a.

The panel decision of the Court of Appeals has been published at 135 LRRM 2713 (1990) and is reprinted as Appendix B. *See* App. 48a-70a. The decision of the United States District Court for the District of Massachusetts is not published and is reprinted as Appendix C. *See* App. 71a-82a.

JURISDICTION

The *en banc* order and judgment of the First Circuit were entered on May 15, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, as well as sections 2(2), 8(e), and 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 152(2), 158(e) & 158(f), are reprinted in Appendix H. *See* App. 110a-112a.

STATEMENT OF FACTS

This case involves a dispute over the legality of a bid specification issued by the Massachusetts Water Resources Authority ("MWRA") in soliciting construction contractors to work on the Boston Harbor Wastewater Treatment Facilities ("the Project"). The Project is the largest wastewater treatment project in the nation and the largest public works project ever undertaken in New England. Joint Appendix in the Court of Appeals ("J.A.") 149, 236.[1] Initiated as a result of a court order

[1] The Project, anticipated to cost $6.1 billion over a ten-year period, will involve construction of a new primary and secondary wastewater treatment plant; a five-mile inter-island tunnel to carry sewage from Nut Island to Deer Island for treatment; a 9.5 mile effluent outfall tunnel; sludge treatment facilities; and related facilities. J.A. 48-49.

holding that wastewater discharges into Boston Harbor were violating the Clean Water Act, the Project is being conducted pursuant to a judicially-imposed timetable for completion within 10 years. *United States of America v. Metropolitan District Commission*, C.A. No. 85-0489-MA (D. Mass. 1990) (Mazzone, J.).

Pursuant to its enabling legislation, MWRA, an agency of the State of Massachusetts, owns the property, funds the construction of the Project, establishes bid conditions, awards contracts, pays the contractors, and "generally exercises control and supervision over all aspects or th[e] project." App. 3a. In 1988, MWRA selected Kaiser Engineers, Inc., a private, nationally-prominent construction firm with experience in managing large and complex projects, as its construction manager, and charged Kaiser with supervising the ongoing construction activity and overseeing labor relations on the job-site.

Given the magnitude and complexity of the project, the sheer numbers and variety of contractors and employees involved, and the geographic limitations of the site, MWRA was particularly concerned with avoiding any labor-related disputes that might impede its ability to meet its court-imposed deadlines. At the outset, MWRA therefore sought Kaiser's recommendations for a labor relations policy that would assure labor harmony and stability over the ten-year life of the Project. On Kaiser's recommendation, MWRA authorized Kaiser to negotiate a project labor agreement with the Building and Construction Trades Council of the Metropolitan District ("the Council")—an organization of the area's construction trades unions—while reserving the right to approve the final agreement.

In mid-May, 1989, Kaiser and the Council concluded negotiation of the Project Labor Agreement. The Agreement reconciled portions of over thirty separately-

negotiated labor-management agreements, and established the wages, benefits and working conditions for all the construction crafts on the Project. The Project Agreement contains a 10-year no-strike commitment and an expedited procedure for resolving all disputes; provides use of union hiring halls to supply skilled craft labor to the Project; recognizes the Council as the exclusive bargaining agent of all craft employees on the Project; and requires that "the construction work covered by this Agreement shall be contracted to contractors who agree to execute and be bound by the terms of this Agreement." App. 5a-6a.

On May 28, 1989, the MWRA Board of Directors approved the use of the Agreement and, to effectuate the Agreement, added the following language as Specification 13.1 of its bidding procedures:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of [the Master Labor Agreement] as executed and effective May 22, 1989, by and between [Kaiser] and the [Council] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract. . . .[2]

On March 5, 1990, Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC")—an

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[2] While requiring successful bidders to abide by the Project Agreement, *neither the Agreement nor Specification 13.1 limits the bidding to union contractors.* To the contrary, *any* qualified bidder can compete for a contract, without regard to whether the bidder has a pre-existing bargaining relationship with a union, and without regard to the bidder's willingness to sign any other agreement with Council members. The Agreement governs *only* work on the Project, and does not obligate any contractor to sign any other agreement with Council members or in any way to alter its labor relations practices elsewhere. J.A. 46, 49, 50.

association of non-union construction contractors—joined by its national association and five non-union contractors, brought suit in the United States District Court for the District of Massachusetts, seeking to enjoin Bid Specification 13.1.

Although project managers involved in large and complex construction projects in both the private sector and the public sector commonly negotiate labor agreements such as the one at issue here—and although such agreements in the private sector are unquestionably lawful under §§ 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) & (f)—ABC challenged the lawfulness of this project labor agreement on the theory that different rules should apply to public construction projects.[3]

On April 11, 1990, District Judge Mazzone issued a memorandum and order which analyzed and rejected each of ABC's various federal preemption, federal antitrust and state procurement law theories, and denied the injunction. *See* App. 71a-82a.

On October 24, 1990, a panel of the United States Court of Appeals for the First Circuit reversed Judge Mazzone. In an opinion by Circuit Judge Torruella, the panel accepted ABC's theory that MWRA's bid specification is preempted by the NLRA. The panel reached no other issues. *See* App. 48a-70a.

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[3] Another contractors' association, the Utility Contractors Association of New England, had earlier filed a charge with the National Labor Relations Board ("NLRB") challenging Kaiser's project labor agreement as violating the NLRA rules governing such agreements. J.A. 371. The NLRB General Counsel refused to issue a complaint, finding the charge meritless. *See Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) (NLRB Division of Advice Memorandum evaluating Kaiser's project labor agreement, finding the agreement fully lawful under the NLRA's requirements, and recommending dismissal of the charge) (reprinted as Appendix D, *see* App. 83a-88a).

On November 6, 1990, the Council filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition"), which asserted that the panel had wrongly decided an important issue of federal labor law: Whether a state entity, when acting as a property owner and contracting for construction services to develop its own property, is prohibited by the NLRA from imposing conditions in its bid specifications which, when imposed by a private owner, are commonplace and fully lawful under the NLRA. On January 3, 1991, the First Circuit granted the Council's suggestion for rehearing *en banc*.

On May 15, 1991, the *en banc* court, in a 3-2 decision, again found the bid specification preempted by the NLRA and remanded the action to the District Court. *See* App. 1a-47a. The majority opinion held that the MWRA's requirement that its contractors agree to the project labor agreement is preempted by the NLRA as a "direct" state "interference into the collective bargaining process." App. 30a. The majority based that holding on the premise that "Congress occupied the field" in passing the NLRA, prohibiting virtually all state involvement in private sector labor relations. App. 24a; *see also* App. 10a-11a & 14a n.13.

In a dissent, Chief Judge Breyer—joined by Circuit Judge Campbell—argued that a State is not preempted by the NLRA from seeking to serve its "economic self-interest as a purchaser [of construction services]" in the same manner that the NLRA permits similarly situated private parties. App. 43a-44a.

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act—as an integral part of its considered, carefully-balanced scheme for regulating labor relations in the construction industry—permits property owners who are developing their property to specify that all contractors and subcontractors working on the building project must agree to a uniform labor agreement governing all project work. *Nothing* in the NLRA, in any National Labor Relations Board decision, or in any prior judicial decision limits that permission to private property owners.

Nonetheless, the First Circuit, in its 3-2 *en banc* decision, has held that the NLRA *impliedly* denies the owners of public property the very prerogatives in developing their property that the NLRA vouchsafes to private property owners, even when the State's actions serve the same proprietary interests and have the same effects on all concerned. To state that ruling is to refute it.

In order to reach its unlikely result, the majority below inverted a basic premise of our federal system. Rather than assuming that Congress showed special solicitude for the interests of the States—as would be consistent with the normal rules of preemption and the specific text of the NLRA, *see* 29 U.S.C. § 152(2) (excluding the States and their subdivisions from the NLRA's regulatory regime)—the decision below puts the interests of the States and their subdivisions on *a lower level* in carrying out their proprietary tasks than the identical interests of private parties carrying out the same kind of task.

Congress has from time to time made state economic actions subject to the *same* federal restrictions as private actions. We know of no instance, however, in which Congress has presumed to enact regulatory legislation under the Commerce Clause that restricts the proprietary actions of the States alone. Nor are we aware of any authority that Congress could do so. *Cf.*

Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985); *Fry v. United States*, 421 U.S. 542 (1975).

In this regard, it is very much to the point that the *en banc* decision below does not decide a question of merely isolated or theoretical importance. To the contrary, as we detail in Part I, *infra*, the decision below disrupts the ability of the States to exert the same measure of control over hundreds of public construction projects—involving billions of dollars and thousands of person-hours—as many private sector developers exert over private construction projects.

By so doing, the majority decision below denies the States the option that both public and private developers have found to be best suited to doing large scale construction promptly, competently and efficiently. Indeed, the decision below stifles in the public sector what is perhaps the most successful and effective form of labor-management cooperation—in the interest of the ultimate users, the developer *and* the skilled craftspersons who do the work—that the construction industry has yet been able to devise.

An *en banc* court of appeals decision invalidating such an important and prevalent labor relations practice—and subordinating the rights of the States to such an extent and at such a cost—plainly presents a federalism question that warrants this Court's immediate attention.

That need is all the more compelling because, as we show in Part II, *infra*, it is difficult to imagine a situation in which there is a weaker claim for expanding the preemption doctrine and diminishing the States' authority. As this Court has so succinctly reminded, the essential point of the Supremacy Clause is to invalidate "state laws that 'interfere with, or are contrary to, the laws of Congress . . . ." *Wisconsin Public Intervenor v. Mortier*, —— U.S. ——, 59 L.W. 4755, 4757 (June 21, 1991)

(*quoting Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824) (Marshall, C.J.)).

In this case, the majority decision below invalidated a state action that does *not* interfere with—and is *not* contrary to—the NLRA's regulation of construction industry labor relations. The state actions at issue here are entirely commonplace, explicitly lawful when taken by private parties, and nowhere specifically prohibited to the States. This forcibly demonstrates that these actions are contemplated by the federal scheme and are a means of effectuating its purposes. The efforts of the majority below to ground its ruling in this Court's NLRA preemption precedents are simply an utter failure. As Chief Judge Breyer stated in his dissent below:

> The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or preempted, a state's power to act as the MWRA has acted here. . . . We do not see how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme", or otherwise interfere with the regulatory system that the NLRA creates. [App. 32a (emphasis in original).]

I. THE IMPORTANCE OF THE STATE INTERESTS AND LABOR RELATIONS INTERESTS AT ISSUE

A. *Project labor agreements*—also appropriately denominated *labor stabilization agreements*—are commonly utilized by both public and private developers. These agreements have found favor as a means of assuring that large and complex construction projects—involving commitments of substantial funds and the coordination

of many contractors over a long period of time—are conducted in an orderly and efficient manner. Such agreements—by setting labor standards and grievance procedures, providing for a steady supply of skilled craft labor, and establishing no-strike and no-picketing commitments—*assure labor stability and provide cost containment on a project-wide and project-duration basis.*

One of the leading texts on construction industry labor relations explains the nature of such "project labor agreements" as follows:

> *Project agreements*: For large projects involving a considerable volume of construction at a single site (or interrelated group of sites) over a period of years, a special agreement will sometimes be negotiated. It may involve the owner of the project as well as his contractors, or it may be sought by the contractor at the owner's insistence. These agreements normally attempt to guarantee the progress of the work without interruption by strikes and to establish special mechanisms for dispute settlement; sometimes they provide means for determining wages and conditions at the projects. While project agreements may be negotiated independently at the national level, at other times they are negotiated with the full cooperation of local parties. [D.Q. Mills, *Industrial Relations and Manpower in Construction* 40 (1972).]

And, a recent United States Department of Labor study explained how the need for such arrangements developed:

> [T]he project agreement developed as a response to problems peculiar to the construction industry. The typical local agreement seldom meets the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs such as travel and overtime pay than local agreements typically provide, uniform shift and other conditions for all trades, and the help of national union officials experienced in securing manpower and administering agreements on large projects. . . . For contractors and owners, one of the chief attractions of such agreements has been their recent inclusion of a clause promising no strikes for the duration of the project. [U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects* 14 (1980) ("Labor Department Study").]

As the same Labor Department study makes clear, such agreements have been extensively used for many decades on both private and public development projects, including many of the Nation's largest and most prominent projects:

> Among the first project agreements designed to meet those problems were those adopted during the construction of a portion of the Grand Coulee Dam in the state of Washington in 1937-38 and the Shasta Dam in California in 1940. Such agreements were later used during the construction of atomic energy and other defense installations during and after World War II, most of the major dams built with union labor in the West, and special projects such as the New York World's Fair and Disneyworld in the 1960s. Then, "project agreements proliferated in the late 1960s and the 1970s . . . ." [*Labor Department Study, supra*, at 14 (*quoting* The Business Roundtable Construction Committee, *Special Building Trades Agreements* 12 (October 1977)).]

Such agreements have continued to be extensively used for large-scale construction projects in the private sector and, as we show at pp. 12-13, *infra*, in the public sector as well. Their legitimacy in the private sector has been repeatedly upheld. *See, e.g., Jim McNeff v. Todd*, 461

U.S. 260, 262, 270 n.9 (1983).[4] The *en banc* decision below, however, denies to the States the ability to obtain the benefits of such important and widely-used arrangements, regardless of the State's legitimate economic needs.

B. To illustrate the prevalence of these agreements in current public sector construction, the Building and Construction Trades Department, AFL-CIO, obtained samples of project labor agreements governing recent construction on state and locally-financed projects in fourteen states: Arizona, California, Colorado, Florida, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Washington, West Virginia and Wisconsin. Even this limited survey yielded thirty-six agreements for projects with completion dates of 1987 or later. Those projects were worth in excess of $23 billion, and included major projects involving the construction of public hospitals, tunnels, airports, convention centers, office buildings, hydroelectric generators, waste treatment facilities, and mass transit systems.[5]

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[4] For recent examples of private-sector project labor agreements that have involved large-scale and noteworthy projects and have been upheld as fully lawful, *see, e.g., ABC v. Ohbayashi Corp.*, Civil Action No. 87-38 (E.D. Ky. Oct. 26, 1987) (reprinted as Appendix E at App. 89a-96a) (upholding project agreement governing construction of major automobile assembly plant for Toyota Corporation); *Morrison-Knudsen*, 13 NLRB Adv. Mem. Rep. ¶ 23, 061 (NLRB-GC 1986) (reprinted as Appendix F at App. 97a-102a) (upholding project agreement governing construction of major automobile assembly plant for Saturn Corporation); *International Union of Operating Engineers, Local 3*, NLRB Case Nos. 27-CE-27 & 28 (NLRB Reg. Dir. April 16, 1982) (reprinted as Appendix G at App. 103a-109a) (upholding project agreement governing construction of large fossil fuel power plant); *Assoc. Gen. Contractors v. Otter Tail Power*, 611 F.2d 684 (8th Cir. 1979) (upholding agreement governing construction of large fossil fuel power plant).

[5] Among these recent public projects governed by project labor agreements are the following:

Arizona: hydroelectric generator for Salt River Project Agricultural Improvement and Power District in St. Johns.

California: heavy and light rail systems for Southern California Rapid Transit District; convention center in Los Angeles; cogeneration facilities for Los Angeles; Hyperion Sewage Treatment Plant in Playa del Rey; Ronald Reagan State Office Building in Los Angeles; J. Paul Getty Center in Los Angeles; North Fork Stanislous River Hydroelectric Development Project in Calaveras County; school construction for Los Angeles Unified School District; convention center in San Diego; hydroelectric generator for Kings River Conservation District; two prisons in Fresno; cogeneration facilities for the California State Hospital in Camarillo and the California Institute for Men in Chino.

Colorado: prison facility in Ault.

Florida: solid waste resource recovery facility in Palm Beach; airport construction in Orlando.

Illinois: airport construction at O'Hare Airport.

Maryland: Fort McHenry Trench Tunnel Project and Baltimore Harbor Tunnel Rehabilitation Project in Baltimore.

Massachusetts: resources recovery plant in Rochester; New Third Harbor Tunnel in Boston.

Michigan: Cobo Hall expansion in Detroit; airport construction at Detroit Metropolitan Airport; Engineering Building at Michigan Technical University in Houghton.

Nevada: Chalk Bluff Water Treatment Facility in Reno.

New Jersey: resources recovery plant in Camden County.

Oregon: resource recovery plant in St. Helens.

Washington: wastewater treatment plant in Tacoma; steam plant in Tacoma; highway overpass and interchange in Grays Harbor County.

West Virginia: tunnel ventilation test facility in Charlestown; West Virginia University Hospital in Morgantown.

Wisconsin: Vocational Technical Adult Facility in Madison.

The vast majority of these projects are structured in the same manner as the Boston Harbor project at issue here: the state or local entity has financed and authorized the construction and retained a private general contractor or construction manager, who in turn has negotiated and executed the project labor agreement with an area construction union council.

C. The First Circuit's *en banc* decision thus calls into question the legitimacy of the project labor agreements by which the States are developing a vast number of their most important state projects. By so doing the decision below threatens the prompt, economical completion of

these projects. For example, based on the majority decision below, a panel of the Eighth Circuit (by 2-1 vote) recently enjoined the City of Minneapolis from using project labor arrangements in its construction of a new municipal bridge. *See Glenwood Bridge, Inc. v. City of Minneapolis*, —— F.2d ——, Slip op. No. 91-1442 (8th Cir. Aug. 2, 1991).[6] For this reason alone, this case warrants this Court's attention.

II. THE CONFLICT BETWEEN THE DECISION BELOW AND THIS COURT'S NLRA PREEMPTION DOCTRINES

The majority decision below rests its holding—that federal law preempts MWRA's requirement that contractors on MWRA's construction project abide by the previously negotiated project labor agreement—on that branch of NLRA preemption law known as *Machinists* preemption. *See Machinists v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132 (1976); *see also Teamsters v. Morton*, 377 U.S. 252 (1964). From beginning to end, however, that opinion misunderstands and misstates that preemption doctrine. The result is that it is the court of appeals decision—rather than any action of MWRA—that undermines the national labor policy.

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[6] The *Glenwood* panel majority reasoned that—given the First Circuit's decision—the nonunion contractor's motion to enjoin Minneapolis' use of a project agreement "present[ed] a sufficiently strong" claim of federal preemption to merit issuance of a preliminary injunction, despite the City's concern that without the project agreement's no-strike guarantees "the project might not be completed . . . in time." Slip op. at 2, 14-15.

In dissent, Senior Judge Heaney argued that the First Circuit's 3-2 *en banc* decision "was wrongly decided." Slip op. at 23. Agreeing with Chief Judge Breyer's dissenting opinion below, Judge Heaney reasoned that neither the text, nor the structure, nor the underlying policies of the NLRA could justify preemption. As he stated, "the city is . . . entitled to the protection of a prehire agreement for the same reason as other owners or general contractors: it wants to preserve peaceful working conditions to get the job done on time." Slip op. at 26.

A. This Court has explained that the *Machinists* doctrine was designed "to govern preemption questions that arose concerning activity that was neither arguably protected . . . nor arguably prohibited" by the NLRA's specific terms. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985). Under that doctrine, the courts must determine if a State's regulation of conduct conflicts with Congress' affirmative intent—as reflected in the overall structure of the NLRA—that certain labor-related conduct remain "unregulated" and "controlled [only] by the free play of economic forces." *Machinists, supra*, 427 U.S. at 140.[7]

As with any preemption doctrine, the point of the *Machinists* analysis is "to preclude, as far as reasonably possible, *conflict*" between state policies and the federal regulatory plan. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-86 (1971) (emphasis added). And, as with any preemption analysis, "the purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co., supra*, 471 U.S. at 749-50 n.27.

In this regard, the Court has emphasized that "[t]he [NLRA] leaves much to the states," but that "Congress has refrained from telling us how much." *Machinists, supra*, 427 U.S. at 136. Thus, the courts "must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Id.* Drawing "implicat[ions from] the structure of the Act itself," the courts must, in other words, "determine [Congress's intended] impact on State law [from] the wider contours

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[7] The *Machinists* doctrine is distinct from the other major branch of NLRA preemption doctrine—*Garmon* preemption—which governs cases where there has been state regulation of conduct that is either arguably protected or prohibited by the NLRA's specific regulatory terms. *See San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959); *see also Metropolitan Life Ins. Co., supra*, 471 U.S. at 748-51 (describing "two distinct NLRA preemption principles"). For discussions of the inapplicability of *Garmon* preemption principles to the State's action at issue in this case, see pp. 21-22 & n.13, p. 24, *infra*.

of federal labor policy." *Metropolitan Life Ins. Co.*, *supra*, 471 U.S. at 749, 753.

B. It is absolutely plain that MWRA's actions at issue here create *no conflict at all* with the NLRA's statutory scheme.

First, the State here played *no regulatory role whatsoever*: MWRA acted only as an owner and developer of its own property and, in that capacity, acted no differently from private owners and developers who are similarly situated. MWRA sought *only* to protect its own proprietary interests in the efficient development of its own project and, accordingly, sought to influence the labor relations of contractors and subcontractors *only* with respect to work done on that project. MWRA, moreover, brought to bear *only* such leverage as the Authority derived from its prerogatives as owner of the project. Thus, MWRA acted in just the way any private property owners would act: through well-understood and lawful arrangements relating to project labor agreements.

MWRA's actions here are indistinguishable from those of a private owner and developer of property, and MWRA has *not* acted as an entity exercising government regulatory authority over private parties or seeking government regulatory goals. Given this, the respondents' claim here is that state-owned construction projects must operate entirely differently from privately-owned projects, and that the states—*alone among all owners of property*—are consigned to having their substantial proprietary interests sacrificed according to the labor-relations choices made by their contractors and subcontractors.

Second, MWRA's actions *fully reflect*—and do *not* interfere with or distort—the "economic forces" that Congress expected would govern construction industry labor relations. Precisely because developers of complex construction projects need—and seek—assurances of stable labor relations and adequate supplies of skilled labor *on a project-wide basis*, developers often require contractors

and subcontractors to agree to a project labor agreement as a condition of accepting project work. *See* pp. 9-13, *supra*. That is an economic reality of the construction industry.

Equally to the point, the use of project labor agreements in the construction industry—and the binding effect of such agreements on contractors and subcontractors—*are specifically sanctioned by the NLRA*. *See* NLRA §§ 8(e) & (f), 29 U.S.C. §§ 158(e) & (f) (establishing special rules for the construction industry that permit project labor agreements). Indeed, this Court has recognized that Congress, in passing these provisions, specifically envisioned that contractors and subcontractors would be subject to precisely the pressures that are at issue here. *See Jim McNeff v. Todd*, 461 U.S. 260, 265-266, 270 & n.9 (1983) (noting that it is "implicit in the construction industry proviso" of NLRA § 8(e) that subcontractors are subject to economic pressures to sign previously negotiated project labor agreements as a condition of working on a project); *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 659-660, 662 n.14, 633 & n.15 (1982) (same).[8]

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[8] NLRA § 8(e), 29 U.S.C. § 158(e), which otherwise prohibits collective bargaining agreements that preclude an employer from dealing with third parties, contains an explicit "construction industry proviso," which exempts from this prohibition, construction industry agreements regarding contracting and subcontracting. *See* App. 110a-111a.

NLRA § 8(f), 29 U.S.C. § 158(f), similarly establishes a special rule for the construction industry to permit collective bargaining agreements in which employers recognize unions as bargaining representatives of employees who have not yet been hired. To protect employee free choice, however, § 8(f) contains a proviso that reserves to employees, once hired, the unfettered opportunity to utilize NLRB election processes if they choose to change their bargaining representative—or to have no bargaining representative—and to vacate the "pre-hire" agreement. *See* App. 111a-112a.

Operating together, these provisions validate construction industry collective bargaining agreements that establish labor terms and union recognition for a construction project as a whole, and that, accordingly, require that all contractors and subcontractors who are

Thus, as Chief Judge Breyer explained in his dissent below:

> [W]hen the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, *it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.* [App. 34a (emphasis added)].

This case, then, presents a situation in which a State's actions *as a property owner* are entirely consistent with Congress's intended "free play of economic forces." Indeed, *it is the very limits placed on the State's actions by the decision below* which serve to radically alter the "free play of economic forces" that Congress expected would normally structure labor relations in this industry. Nothing in the NLRA's text, history, or structure indicates that Congress intended such a peculiar result.

C. The court of appeals majority failed to make any extended effort to examine the "wider contours of federal labor policy," *Metropolitan Life Ins. Co., supra*, 471 U.S. at 753, in order to discern whether MWRA's actions interfere with the NLRA's intended "free play of economic forces," *id.*

Instead, the majority below began and ended its analysis by presuming that *all* state actions directly concerned with the private sector collective bargaining process are preempted by the NLRA. *See, e.g.*, App. 11a ("in the area of labor relations there is 'not only a general intent to preempt the field but also . . . [the] inescapable implication of exclusiveness'") (*quoting Guss v. Utah Labor Relations Board*, 353 U.S. 1, 10 (1953)); App. 24a ("Congress occupied the field to the exclusion of such

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subsequently engaged to work on the project must agree to be bound to the agreements' provisions. *See Jim McNeff v. Todd, supra*, 461 U.S. at 270 & n.9; *Woelke & Romero Framing v. NLRB, supra*, 456 U.S. at 659-660, 663.

local regulations as are exemplified by Specification 13.1") (*citing Guss, supra*); App. 30a (preemption is appropriate whenever "interference into the collective bargaining process by the state is *direct*") (emphasis in original) (*citing Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1985)).

On this basis, the majority below declared it irrelevant that Congress had sanctioned the use of project labor agreements by private parties in the construction industry (App. 24a), and deemed it equally irrelevant that MWRA acted only as an owner seeking to utilize project labor arrangements to further its proprietary concerns, (App. 27a-30a).

The court of appeals majority's premise that *all* state involvement in private-sector collective bargaining is preempted is plainly wrong. This Court has never stated that the NLRA "preempt[s] the field" with respect to labor relations. Nor has this Court ever stated that the NLRA prohibits all "direct" state involvement in the collective bargaining process.

To the contrary, the Court has repeatedly emphasized that the NLRA does *not* "declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." *Metropolitan Life Ins. Co., supra*, 471 U.S. 757. And, the *Machinists* Court itself emphasized that the NLRA "leaves much to the states, though Congress has refrained from telling us how much." *Machinists, supra*, 427 U.S. at 136.

The issue in a *Machinists* case is *not* therefore whether the state entered the processes of private-sector collective bargaining, but whether the State "entered . . . 'the bargaining process *to an extent Congress has not countenanced.*'" *Golden State Transit Corp. v. Los Angeles, supra*, 475 U.S. at 616 (*quoting Machinists, supra*, 427 U.S. at 149) (emphasis added). As Chief Judge Breyer put it:

> [T]he *Machinists* case itself makes clear that the Act does not forbid all state action that might favor labor, but, rather, only those state actions that interfere with Congress' '*intentional* balance.' Here, . . . we believe Congress intended a 'balance' in the construction industry that includes prehire agreements. . . . [T]he NLRA seems basically intended to supplant state labor regulation, not to supplant all legitimate state activity that might affect labor. [App. 40a-41a (*quoting Golden State, supra*, 475 U.S. at 614) (emphasis added by Breyer, C.J.)]

D. As noted above, the majority decision below largely relied on two of this Court's precedents for its broad ruling that *all* state involvement in private sector collective bargaining is preempted. *See* App. 10a-12a, 24a (discussing *Guss v. Utah Labor Relations Board, supra*); App. 15a-16a, 29a-30a (discussing *Golden State Transit Corp. v. Los Angeles, supra*). As we now show, there is nothing in either of these decisions—or in any of the other decisions of this Court—that supports the position of the court of appeals majority.

First, the majority read the *Guss* case as stating that under the NLRA, "in the area of labor relations there is 'not only a general intent to pre-empt the field but also . . . [the] inescapable implication of exclusiveness.'" App. 11a (*quoting Guss, supra*, 353 U.S. at 10) (ellipses and brackets in original). *See also* App. 24a (citing *Guss* for proposition that "Congress occupied the field" in the area of labor relations). *Guss*, however, states no such broad rule of NLRA preemption. The language from *Guss* is quoted out of context, and, when placed in context, offers the majority below no support.

The *Guss* case involved the preemptive effect of one particular provision of the Act, NLRA § 10(a), 29 U.S.C. § 160(a), which grants the NLRB authority to enforce the unfair labor practice provisions contained in § 8 of the Act, 29 U.S.C. § 158, and which also, in a proviso, grants the NLRB authority to enter agreements ceding

to state agencies certain aspects of NLRA § 8 enforcement authority. In *Guss*, the Court held that a state labor board could not conduct unfair labor practice adjudications for conduct within the NLRB's jurisdiction, when the NLRB had declined to exercise its jurisdiction but had *not* entered any agreement ceding its authority to the State.[9]

While the opinion below understood *Guss* to state that the NLRA ousts all state authority "in the area of labor relations," *Guss* did no such thing. The language from *Guss* upon which the court below relied, when quoted in full—as we do in the margin—says no more than that Congress intended the NLRB's *unfair labor practice jurisdiction as set out in § 10(a)* to be exclusive in the sense that the States cannot conduct unfair labor practice adjudications.[10]

The instant case does not involve any state regulation of conduct that would arguably constitute an unfair labor practice under § 8, so there is no potential for any incursion into the NLRB's jurisdiction under NLRA § 10(a). What *Guss* stated regarding the preemptive power of § 10(a) is, therefore, entirely irrelevant.[11]

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[9] The Court had previously held that the NLRB's unfair labor practice jurisdiction under § 10(a), when exercised, is exclusive. See *Guss, supra*, 353 U.S. at 6 (*citing Garner v. Teamsters Union*, 346 U.S. 485 (1953)).

[10] *Guss* stated:

> Our reading of § 10(a) forecloses the argument [of the state labor board] that 'where federal power has been delegated but lies dormant and unexercised,' *Bethlehem Steel Co. v. New York Labor Board*, [330 U.S. 767] at 775, the State's power to act with respect to matters of local concern is not necessarily superseded. But in each case the question is one of congressional intent. *Compare Welch Co. v. New Hampshire*, [306 U.S. 79], with *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605. And here we find not only a general intent to pre-empt the field, but also the proviso to § 10(a), with its inescapable implication of exclusiveness. [*Guss, supra*, 353 U.S. at 10.]

[11] *Guss* was one of the decisions relied upon in *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), which summarized NLRA

Second, the court of appeals majority's reliance on *Golden State Transit Corp. v. Los Angeles*, *supra*, is no more soundly based. According to the decision below, *Golden State* stands for the rule that the NLRA preempts all state actions that "directly interfere[] with the collective bargaining process." App. 29a; *see also* App. 30a.

But, rather than creating any absolute preemption policy, the *Golden State* test is whether the State has "'[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced.*'" 475 U.S. at 616 (brackets in opinion; emphasis added) (*quoting Machinists*, *supra*, 427 U.S. at 149).

Thus, *Golden State* requires inquiry into whether a particular state action conflicts with the NLRA regulatory scheme. As this Court has emphasized, such an inquiry requires analysis of the "scope, purport, and impact of the state program," *New York Tel. Co.*, *supra*, 440 U.S. at 532, against "the wider contours of federal labor policy." *Metropolitan Life Ins. Co.*, *supra*, 471 U.S. at 753. And, as we have shown, in this case the "scope, purport, and impact" of MWRA's actions here—which were in all relevant respects indistinguishable from those of similarly-situated private developers of property—did not affect the NLRA's operations in any ways unintended by Congress. *See* pp. 16-18, *supra*.[12]

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preemption law relating to the NLRB's jurisdiction. As this Court has repeatedly noted, the *Garmon* and *Machinists* theories of pre-emption represent "two distinct NLRA pre-emption principles." *Metropolitan Life Ins. Co.*, *supra*, 471 U.S. at 748; *see also id.* at 748-751.

[12] The decision below also relied on *Golden State* more generally, arguing that "the similarities" between *Golden State* and the instant case both argue for preemption here, and refute the notion that the proprietary nature of a State's actions can legitimize such actions. App. 15a-16a, 29a-30a. Again the court of appeals majority misread this Court's precedents.

In *Golden State*, the City of Los Angeles had required a taxi company serving the general public to settle a private-sector strike. In particular, the city refused to renew the company's license unless the company settled, despite the fact that the taxicab company was "in compliance with all terms and conditions of [its] franchise," 475 U.S. at 610, and despite the fact that "the city's policy at the time . . . was not to limit the number of taxi companies or the number of taxis in each fleet." *Id.* at 611. On these facts, this Court held that the city had used its regulatory powers to intervene in a private labor dispute, regulating "the free use of economic weapons" in a way Congress had not intended. 475 U.S. at 617.

Los Angeles, then, did *not* act as a market participant: *viz.*, as an actor in the unregulated "free play of economic forces." Instead, Los Angeles engaged in uniquely governmental regulatory action. It is axiomatic that *no* private party has the power that the city wielded in *Golden State*. Participants in market transactions *cannot* prohibit by law the right of other participants to continue to operate if the latter do not do the former's bidding. *Golden State* therefore has nothing to do with state actions in contexts where—as here—*the State acts out of the same proprietary interests and economic needs, and in the same manner, as similarly-situated private parties.*

E. The sum of the matter is this: the state actions at issue here cannot be equated with the state labor regulations that have been examined by this Court in *Machinists* cases. Here the State, as a property owner and developer, is doing no more than seeking to conduct its affairs like any other owner and developer operating in the market. There is no evidence that Congress intended the NLRA to uniquely disable public entities in such market dealings, leaving them powerless to defend their legitimate economic interests through the use of normal—and normally lawful—contractual arrangements.

Nor is there evidence that Congress, in passing the NLRA, intended that the relations of construction industry labor and employers should be governed by different rules—and through a different balance of economic forces—because of the fortuity that in a given case a public entity is the ultimate purchaser of their services.

The subcontractors who complain that they may not be made subject to Kaiser's project labor agreement would clearly have no complaint if the project were privately

owned and the pressures were exerted by an identically situated private owner: Congress has specifically decided that they should have no such complaint. *See Jim McNeff v. Todd*, *supra*, 461 U.S. at 270 n.9; *see also Morrison-Knudsen Co.*, *supra* (App. 97a-102a). Nothing in national labor policy calls for a different result here.[13]

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[13] The court of appeals majority placed all but exclusive reliance on the *Machinists* doctrine, (App. 15a-16a, 29a-30a), and our analysis has proceeded accordingly. At various points, however, the decision below also states that the MWRA actions at issue in this case "implicat[e]" the *Garmon* preemption doctrine as well. App. 15a, 21a. The only explanation as to why MWRA's actions might "implicat[e]" the *Garmon* doctrine is an assertion, without argument or citation, that the project labor agreement's provision for union recognition interferes with employee NLRA § 7 rights. App. 21a.

Given that NLRA § 8(f) expressly endorses the use of such project labor agreement provisions—and expressly protects employee free choice during the agreement's term, 29 U.S.C. § 158(f) (provisos), *see* n.8, p. 17, *supra; see also* App. 111a-112a—there is clearly no merit to the argument that the project labor agreement's terms in any way violate employee NLRA § 7 rights.

Indeed, as we have noted, *see* n.3, p. 5, *supra*, the specific project labor agreement at issue here was the subject of a subcontractor's charge to the NLRB, and the NLRB General Counsel rejected the charge as meritless, finding that the project labor agreement here does not violate the NLRA.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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